Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

VESSEL MY GIRLS and JOHN N. SINGLETON,

Petitioners,

v.

MARINA MANAGEMENT SERVICES, INC., d/b/a/
JAMES CREEK MARINA as Agent for
MIF REALTY, LP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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145pp

QUESTIONS PRESENTED FOR REVIEW

1. Can an agent, who does not possess the substantive right to a debt owed, prosecute an action as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure in his own name or as agent for his principal, even if the agent is authorized by the principal?

2. May the Court of Appeals on review of an appeal from the District Court make findings of fact on issues not resolved by the District Court, or must the Court of Appeals remand the case to the District Court for determination of the factual issues?

3. May the District Court dismiss counterclaims pursuant to Rule 11 as frivolous and interposed for an improper purpose without making specific findings setting forth the basis of its ruling that the counterclaims were frivolous and interposed for an improper purpose?

4. Did the Court of Appeals properly apply the abuse of discretion standard of review as established by the Court in *Cooter & Gell* by applying a wholly deferential standard of review to the District Court's conclusory findings that defendant's counterclaims were frivolous and interposed for an improper purpose and should be dismissed under Rule 11, where there were no specific findings to review, as required by Rule 11, setting forth why the counterclaims were deemed frivolous and interposed for an improper purpose?

5. Did the Court of Appeals err in not applying a deferential standard of review to the District Court's specific finding that plaintiff made material misrepresentations to the District Court and misled the District Court, and should be sanctioned under Rule 11?

PARTIES TO THE PROCEEDING

The following persons and entities were parties before the United States Court of Appeals for the District of Columbia Circuit:

1. Vessel My Girls, *In Rem* and John N. Singleton, *In Personam*, defendants, appellees and cross appellants; and

2. Marina Management Services, Inc., d/b/a James Creek Marina as Agent for MIF Realty, LP, and Lisa Petti Ellis as Attorney, plaintiff (except Ms. Ellis), appellants and cross appellees.

CORPORATE DISCLOSURE STATEMENT

The claimed owner of the substantive right is MIF Realty, LP which is not a party to the action. MIF Realty LP is, on information and belief, a subsidiary, affiliate or related company of MIF Gen-Par L.P., MIF Sponsor, Inc. and the Archon Group of Irving, Texas.

I, as counsel of record for Vessel My Girls and John N. Singleton, certify, to the best of my knowledge and belief, that there are no parent companies, subsidiaries or affiliates of Marina Management Services, Inc., the respondent, and that there is no publicly held company owning 10% or more of the stock of Marina Management Services, Inc.

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II. As it is the province of the District Court, not the Court of Appeals, to make findings of fact, the Court of Appeals erred in making a finding of fact that the Boat Storage Agreement was extended beyond June 6, 1996. Fact finding by the Court of Appeals is contrary to the decisions of the Court and the practice in other circuits. .. 15

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III. The decision of the Court of Appeals to uphold the dismissal of Singleton's counterclaims as frivolous on an abuse of discretion standard of review without findings by the District Court as to why the counterclaims were frivolous is contrary to Rule 11 and conflicts with the holding of the Court in *Cooter & Gell* and decisions of other Courts of Appeal such as the Second Circuit. 19

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PETITION FOR WRIT OF CERTIORARI

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS IN THE CASE

The Opinion and Judgment of the Court of Appeals for the District of Columbia Circuit in this case appears in the Appendix to the petition at App. 1a and 21a. This decision has been officially reported at 202 F.3d 315 (D.C. Cir. 2000).

The May 29, 1997 opinion of the District Court relating to James Creek Marina as the real party in interest has been reported at 964 F. Supp. 20 (D.D.C. 1997) and appears in the Appendix to the petition. App. 25a. The other relevant Orders and Opinions in this case also appear in the Appendix to this petition, but have not been officially or unofficially reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 11, 2000, App. 21a. with an opinion. Opinion, App. 12a. A timely petition for rehearing was filed on March 13, 2000 and was denied on March 29, 2000. App. 58a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

Jurisdiction of the United States District Court for the District of Columbia existed under 46 U.S.C. § 31342 (1994) and 28 U.S.C. §§ 1331, 1333 (1994). Jurisdiction of the United States Court of Appeals for District of Columbia Circuit over the appeal and cross appeal of a final order and judgment and all prior non-final orders in the case was grounded upon 28 U.S.C. § 1291 and §1292(a)(3) (1994).

STATUTES AND RULES

RULE 11.

Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) **Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, ...

(b) **Representations to the Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions

stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated. . . .**

(A) . . .

(B) **On Court's Initiative.** On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto . . .

(2) . . .

(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

RULE 17.

Parties Plaintiff and Defendant; Capacity

(a) **Real Party in Interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Columbia by Marina Management Services, Inc. (Marina Management) as "Agent" for MIF Realty LP (MIF Realty) to collect unpaid boat storage fees in excess of $30,000 from defendant/ petitioner John N. Singleton. Amended Verified Complaint, App.79a-87a.

In its original Verified Complaint, Marina Management in the name of James Creek Marina alleged that over $26,000 was owed. Verified Complaint, App. 60a-65a. This allegation was supported by a statement history of amounts due, the verification of a Marina Management official and a Boat Storage Agreement for a term between April 1, 1994 and March 31, 1995 (which had been agreed to by Singleton in an Application Form) Verified Complaint, App. 66a-78a. Based upon the Verified Complaint, Singleton's boat was arrested on March 5, 1997 by Order of the District Court (The Honorable Paul L. Friedman). Order of Arrest, App. 23a-24a. The statement annexed to Verified Complaint claimed amounts due from February 10, 1995 to February 27, 1997. Statement, App. 70a-77a. Marina Management also sought foreclosure. Verified Complaint, App. 64a.

Singleton contended that his boat had been seized on the basis of a claimed amount, composed in part of backdated transient fees of $980 a month, and that the claim was grounded upon an agreement which had expired on June 6, 1996, as alleged by Marina Management in its original and Amended Verified Complaint. Verified Complaint, App. 62a; Amended Verified Complaint, App. 81a.

The original plaintiff in the action was James Creek Marina. James Creek Marina was dismissed as party plaintiff on the ground that James Creek Marina was not the real party in interest. *James Creek Marina v. Vessel My Girls*, 964 F.

Supp. 20 (D.D.C. 1997). Opinion, App. 25a-31a. After James Creek Marina was dismissed, Marina Management Services as Agent for MIF Realty was substituted as party plaintiff. Amended Verified Complaint, App. 79a-87a.

After the boat was seized and Singleton was deprived of its use because he could not afford the general bond imposed by law (over $50,000) or the special bond set by the Court ($20,542.67), evidence was obtained that the supporting invoice, relied upon by the District Court in ordering the vessel arrested, consisted mostly of transient fees that had never been charged to Singleton before and were backdated on the invoice. Some fees covered periods after the contract had expired on June 6, 1996. *See*, Statement, App. 70a-77a.

Singleton's counsel vigorously attacked Marina Management for misleading the Court and depriving Singleton of his boat by claiming fees in amounts that Singleton was unable to afford a bond. As the Marina's managers were mere agents and not the owners of the marina concession contract with the U.S. Government, Singleton's counsel also challenged the Marina's right to prosecute the claim for the debt and to have the boat arrested.

In due course, the District Court issued a Memorandum Opinion and Order, stating that the District Court:

> was misled by the document attached to plaintiff's Verified Complaint into believing that transient fees actually were levied and billed to defendants on the dates listed in plaintiff's exhibit. In addition, this was suggested, if not argued, in papers filed with the Court and during oral argument, and therefore was relied upon by the Court in calculating the amount of security in the Court's May 29, 1997 Opinion. . . .

> Plaintiff now admits that transient fees were never charged before the start of this litigation.

Memorandum Opinion and Order, filed July 7, 1997, App. 32a, 34a-35a.

After a hearing, the District Court, on the basis of the evidence before it, held that the amount actually owed by Singleton was $6,729.17 plus interest and costs, and reduced the bond required from $20,542.67 to $7,535.55, an amount Singleton was able to afford. Memorandum Opinion and Order, filed July 7, 1997, App. 35a-36a. Within days, Singleton deposited this amount with the District Court and the boat was released. Order, App. 37a.

The District Court then ordered Marina Management to show cause why it should not be sanctioned for its misrepresentations to the District Court.

Ultimately, in addition to the boat storage fees found owing ($6,729.17), the District Court also awarded Marina Management attorneys' fees pursuant to a contract between Washington D.C. Associates and Singleton which had allegedly expired on June 6, 1996. Washington D.C. Associates was in bankruptcy under Chapter 11 and there was no evidence in the record that MIF Realty obtained any contract right from Washington D.C. Associates, or that Marina Management had any right to sue on the contract. Finding sanctions against Marina Management appropriate under Rule 11, the Court reduced its claim for attorneys' fees from $30,000 to $10,000 as a sanction for its conduct in misleading the Court. Memorandum Opinion of January 5, 1999, App. 48a-53a.

On June 30, 1997, Singleton moved to dismiss the Amended Verified Complaint under Federal Rule 17(a). Singleton contended that MIF Realty, the new concessionaire, was not a party plaintiff and that Marina Management, as Agent for MIF Realty, was not a real party in interest. On July 25,

1997, the Court denied, without opinion, Singleton's motion that Marina Management was not the real party in interest. Order, filed July 25, 1997, App. 39a-40a.

On August 11, 1997, with the District Court's July 7, 1997 ruling on the misleading invoice in hand, Singleton and his counsel filed an Amended Answer and Counterclaims. Amended Answer and Counterclaims, filed August 11, 1997, App. 88a-97a. In his counterclaims, Singleton sought damages claiming that prior to the release of the vessel to him, some property had been removed from the vessel, and other property on the vessel had been damaged. Singleton further claimed that Marina Management interfered with his business opportunities by the unlawful arrest of the vessel which barred him from leasing it, that the vessel was wrongfully seized, and, as a result of Marina Management's misrepresentations, a prohibitively high bond was set, that he was defamed, and that the seizure resulted from abuse of process, each of which resulted in damages to Singleton. Amended Answer and Counterclaims, filed August 11, 1997, App. 92a-97a.

On August 6, 1997, plaintiff had filed a Motion for Summary Judgment. On February 9, 1998, the District Court entered an Order, indicating its intent to enter judgment for plaintiff in the amount of unpaid storage fees (but not transient fees) and for attorneys' fees pursuant to the Boat Storage Agreement. Order, filed February 9, 1998, App. 44a-47a.

On the same day, the District Court also entered an Order criticizing the conduct of counsel of both parties and characterized Singleton's counterclaims as frivolous and designed primarily to harass. Order of February 9, 1998, App. 41a-43a. The District Court's Order further provided that:

> "unless the parties can resolve all outstanding matters in this case by withdrawing all request for sanctions, withdrawing the offending pleadings, presenting a

> joint request that the Court discharge its Order to show cause, and withdrawing defendant's counterclaims by March 13, 1998, the Court will appoint a special master"

to find facts and "prepare a report recommending appropriate sanctions to be levied and whether either counsel should be referred to this Court's Grievance Committee." Order, filed February 9, 1998, App. 41a-43a.

On February 28, 1998, Defendant's counsel responded to the Court's Order by, *inter alia,* refusing to withdraw Singleton's counterclaims and filing an Affidavit that the counterclaims were warranted by law and fact. Affidavit of Thomas J. Whalen, App. 98a-102a.

On January 5, 1999, the Court entered a final Order, granting plaintiff's Motion for Summary Judgment, entering judgment for the plaintiff for $7,663.21 plus post-judgment interest at 5.391%, awarding plaintiff $10,000 in attorneys' fees, and ordering that the judgment for plaintiff attach to the bond posted with the Court to be disbursed promptly to plaintiff. The Court reduced the attorneys' fee award from the $30,000 amount claimed, by imposing a sanction on plaintiff of $20,000. Order and Judgment, filed January 6, 1999, App. 54a-55a.

Simultaneously, the Court dismissed defendant's counterclaims as appearing frivolous and designed primarily to harass and delay. Order and Judgment, filed January 6, 1999, App. 48a, 52a-53a. The reason stated by the District Court for dismissing the counterclaims appear in the Opinion, specifically in footnote 4. Memorandum Opinion, January 6, 1999, App. 48a-52a-53a.

Marina Management timely appealed and Singleton timely cross appealed. The Court of Appeals reversed in part and

affirmed in part the judgment of the District Court. Opinion, App. 1a-20a; Judgment, App. 21a-22a.

The Court of Appeals found as follows:

1. Although Marina Management was suing as Agent, and MIF Realty possessed the substantive right to be enforced, Marina Management could continue to prosecute the action as the real party in interest on remand, if Marina Management could establish that it was authorized by MIF Realty to bring the action against Singleton, or that MIF Realty consented to or ratified the action brought by Marina Management.

2. Notwithstanding the allegation in the Verified Complaint that the Boat Storage Agreement between Washington D.C. Associates and Singleton was extended until June 6, 1996, and notwithstanding the fact that no documentary evidence had been introduced by Marina Management that a contract existed from 1995 through February 1997 on basis of which storage fees, transient fees and attorneys' fees were claimed, the Court of Appeals found as fact, based upon a statement of Singleton's counsel to the District Court, that the Boat Storage Agreement was extended from June 6, 1996 for another year.

3. Applying a wholly deferential standard of review, the Court, in substance, found that the statement of account annexed to the Verified Complaint should not have misled the District Court and that the record did not show "that Marina Management or its attorney implied that Singleton had been billed for transient rate charges prior to February 1997." Opinion of the Court, App. 17a. "[I]n the absence of a factual basis for the sanction," the Court remanded the case "so that the District Court may enter an order vacating the sanction." Opinion, App. 18a.

4. At the same time, involving the same deferential standard, without findings of the District Court setting forth why the defendant's counterclaims were frivolous and interposed for an improper purpose (to wit: "in the absence of a factual basis for the sanction"), the Court upheld the conclusory findings of the District Court that the counterclaims were frivolous and designed primarily to harass and delay a final resolution of the case. Opinion, App. 19a-20a.

REASONS FOR GRANTING THE WRIT

I. The holding of the Court of Appeals that an agent who does not possess a substantive interest in a claim, even if authorized by his disclosed principal, can nevertheless, pursuant to Rule 17(a), prosecute an action as a real party in interest conflicts with decisions of other United States Courts of Appeal and the decision of the Court in *United States v. Aetna Casualty & Surety Company*.

In the Court below, the Court of Appeals correctly concluded that Marina Management was not the real party in interest in that Marina Management as Agent did not own or possess the right to be enforced. Opinion, App. 6a.

The Court of Appeals then stated that Marina Management could obtain real party in interest status if it were shown that Marina Management was authorized to prosecute the "instant lawsuit," or that MIF Realty "consented to" Marina Management's lawsuit against Singleton, or "ratified" the lawsuit. Opinion, App. 6a-7a.

The Court of Appeals remanded the case to allow Marina Management "to supplement the record or file a second amended complaint." Opinion, App. 7a.

A principal's "consent," "authorization" or "ratification" has nothing to do with the right of an "agent" to bring the claim in his own name or as "agent" for a disclosed principal. The principal whose interest is at stake must be a party, it is submitted, and be subject to discovery and any defenses of the defendant.

The decision of the Court of Appeals on this point conflicts with decisions in other circuits which have considered the question. *Airlines Reporting Corp. v. S&N Travel, Inc.*, 857 F. Supp. 1043 (E.D.N.Y. 1994), *aff'd*, 58 F.3d 857 (2d Cir. 1995); *Hanna Mining Co. v. Minnesota Power and Light Co.*,

573 F. Supp. 1395 (D. Minn. 1983), *aff'd,* 739 F.2d 1368 (8th Cir. 1984); *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D. La. 1953), *aff'd,* 210 F.2d 653 (5th Cir. 1954); *Lewis v. Canadian Pac. Ry.*, 39 F.2d 834 (7th Cir. 1930).

See also, U.S. Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336, 337-38 (M.D.Ga. 1958); 4 James Wm. Moore et al., Moore's Federal Practice §§ 17.10[3][f], [4] (3d Ed. 1998); 6A Wright Miller & Kane, Federal Practice & Procedure: Civil 2d § 1553 at 11; 403-04 (1990).

The Court has not had occasion to consider the application and meaning of Rule 17(a) since the most recent substantive amendment to Rule 17(a) in 1966 (see Advisory Committee Notes, 1966 Amendment) and its decision in *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). *See also, Titus v. Wallick*, 306 U.S. 282 (1939).

Nevertheless, the Court in *Aetna* was absolutely clear that the person who qualifies as a plaintiff must possess the substantive claim. This holding has not been changed by the 1966 Amendment to Rule 17(a). As a consequence, for example, collection attorneys who are authorized to sue in the name of their principal have never been allowed to sue in their own name or as agent for their principal. The claim must be brought in the name of the person who owns the claim.

The facts of the case before the District Court and the Court of Appeals were clear. Marina Management sued and had Singleton's boat arrested as agent for MIF Realty. However, it was MIF Realty who had the U.S. Government concession to the Marina and who possessed the substantive claim to any amounts owed.

Contrary to the Rule 17(a) requirement that an action be prosecuted by the real party in interest, the Court of Appeals stated that if MIF Realty, the owner of the substantive right, consents to, authorizes or ratifies Marina Management's

lawsuit, MIF Realty can stay on the sidelines and Marina Management, on remand, can continue to prosecute the action.

This holding is reversible error. It is a decision in conflict with the decisions of U.S. Courts of Appeals of other circuits, cited above, and the plain language of Rule 17(a). Fed. R. Civ. P. 17(a).

The plain language of Rule 17 requires that "[e]very action shall be prosecuted in the name of the real party in interest," which, in this case, is *not* Marina Management. In 1966, Rule 17(a) was amended by the addition of the following clause:

> "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of the commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Fed. R. Civ. P. 17(a).

The purpose of this amendment was to avoid injustice through the expiration of the statute of limitations and to "codify in broad terms the salutary principle of *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v.*

Downs, 325 F.2d 613 (D.C. Cir. 1963)."[1] Rule 17, Advisory Committee Notes (1966 Amendment).

Under the decision of the court below, if MIF Realty ratifies "commencement of the action," the claim still can be "prosecuted" by Marina Management which is not the real party in interest. On the contrary, under Rule 17(a), if MIF Realty ratifies the commencement of the action, the action will relate back for limitations purposes, but, it is submitted, MIF Realty must then "prosecute" the action as the real party in interest. *See Link Aviation*, 325 F.2d 613. Otherwise, there exists the anomalous situation of Marina Management further prosecuting the action when it is not the real party in interest and does not possess the substantive claim.

The "ratification" provision of the Rule applies only to the "commencement of the action" (for limitations purposes), not to its prosecution. Where, as here, the real party in interest has been identified as MIF Realty, there is no basis under Rule 17(a) for permitting the action to continue to be "prosecuted" by one who is not the real party in interest. It is an unwise precedent to allow persons who are not real parties in interest under Rule 17 to prosecute claims and, in this case, to take action to seize a man's property when such person has no legal right to do so. The Rule does not state that the real party may ratify the conduct of the action, only its commencement for statute of limitations purposes.

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[1] In *Levinson*, the Supreme Court (Frankfurter J.) stated that federal practice allowed an administrator, whose proper appointment came after the expiration of the statute of limitations, to file an amended complaint to relate back to inception of the proceeding. 345 U.S. at 651. In *Link Aviation*, the D.C. Circuit held that the insurers were protected from the statute of limitations by the Rule, even though the action was commenced by the insured which was not the real party in interest. The insurers were then permitted to be substituted as parties. 325 F.2d at 613-14.

Under the holding of the Court of Appeals, a principal could presumably authorize an agent or attorney-in-fact to prosecute an action and, if the principal likes the result, he can "ratify" it. If he does not like the result, he can try again.

Like the Court of Appeals in the present case, other circuits may have misapplied the ratification principle contained in Rule 17(a). *See, e.g., Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9th Cir. 1992); *Arabian American Oil Co. v. Scarfone*, 713 F. Supp. 1420 (M.D. Fla. 1989), *aff'd*, 939 F.2d 1472 (11th Cir. 1991); *Sun Ref. and Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343 (8th Cir. 1986). *See also James v. Nashville Bridge Co.*, 74 F.R.D. 595 (N.D. Miss. 1977).

The Court of Appeals erred in its construction of Rule 17(a), and its ruling is contrary to decisions of other U.S. Courts of Appeal.

II. As it is the province of the District Court, not the Court of Appeals, to make findings of fact, the Court of Appeals erred in making a finding of fact that the Boat Storage Agreement was extended beyond June 6, 1996. Fact finding by the Court of Appeals is contrary to the decisions of the Court and the practice in other circuits.

The Court of Appeals is a court of limited jurisdiction empowered to review District Court findings of fact and conclusions of law under appropriate standards of review. The Court of Appeals is not permitted to find facts, especially when it is contrary to evidence in the case. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *DeMarco v. United States*, 415 U.S. 449 (1974). This is the province and role of the District Court. *See* Fed. R. Civ. P. 52(a), Rule 52, Drafting Committee Notes (1985 Amendment).

In *DeMarco*, the Court stated:

> The Government's response to the petition for certiorari agrees that fact finding is the basic responsibility of district courts, rather than appellate courts, and that the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.

DeMarco, 415 U.S. at 450.

The Court of Appeals is a court of review and correction. It is not the role of the Court of Appeals to make factual determinations on disputed issues. The Court of Appeals' desire to take a shortcut to close the door on important factual issues was error. Courts of Appeal must remand material factual issues to the trial court for resolution.

The only *evidence* of a contract in this case was the one attached to the Verified Complaint and the Amended Complaint. That contract was between Singleton and Washington D.C. Associates with a term from April 1, 1994 "to expire on March 31, 1995." Verified Complaint, App. 62a. There was no "evidence" in the record of a contract extension beyond April, 1995 even though the Marina stated in its Verified Complaint that "[t]he term of the Agreement was extending [sic] by the parties in writing until June 7, 1996." Verified Complaint, App. 62a. That the contract was extended until June 1996 also was restated in the Amended Verified Complaint filed by Marina Management "as Agent for MIF Realty L.P." Amended Verified Complaint, App. 81a.

The Court of Appeals relied upon the following exchange between Judge Friedman and Singleton's counsel for its finding that the contract was extended beyond June 7, 1996. The exchange concerned the bankruptcy of Washington D.C. Associates, the party to Singleton's 1994-1995 contract.

> Judge Friedman: "Now, did I also read in your papers some place that Washington D.C. Associates has now gone bankrupt."
>
> Mr. Whalen: "Yes, your Honor. I talked with the attorney for the trustee. The D.C. Associates went bankrupt. They were still in business through June because Mr. Singleton signed another contract in 1996, which is not part of this - it is not part of the Complaint, but he did sign it with D.C. Associates. But some of the amounts of money that have claimed to be owed is for the period for the contract with D.C. Associates."

Oral Hearing of May 2, 1997, App. 416-417.

Counsel's response to Judge Friedman related to the bankruptcy of Washington D.C. Associates. Counsel stated that Washington D.C. Associates was still in business in 1996 because Singleton signed another contract with Washington D.C. Associates in 1996, presumably, the document that extended the contract until June 1996, as Marina Management had alleged. The Court of Appeals mistakenly relied upon the above exchange to find that Singleton's counsel conceded or stipulated that the contract had been extended beyond June 1996 and thereupon found, as fact, that the contract was extended beyond June 1996. The Verified Complaint and Amended Complaint attest to the contrary. In addition, there was evidence in the record that the Marina's manager had stated on November 20, 1996 that Singleton "has not had a valid license agreement with James Creek since April 1995 and we believe that he is technically trespassing on National Park Service Property." Letter of Robert Taylor, November 20, 1996.

The Court of Appeals was in error when it stated that "Singleton's attorney advised the court that the parties had

extended their agreement in June 1996." Opinion, App. 9a. It was error for the Court of Appeals to hold that "the District Court did not err in finding Singleton's contract extended beyond June 1996." Opinion, App. 2a. The District Court never made such a finding. The District Court simply failed to consider the allegations in the Verified Complaints and, without evidence in the record, simply assumed this fact.

The fact that the Agreement expired in June 1996 is an important issue in the case because, if it expired as Marina Management's Verified Complaints claimed, the contract could not be assigned to anyone in the bankruptcy proceeding of Washington D.C. Associates and consequently neither Marina Management nor MIF Realty could have any contract claims against Singleton.

Counsel's responses to a Federal Judge are not evidence. Juries are told everyday that counsel's statements in court are not evidence. As the burden of proof was on Marina Management, it was incumbent on Marina Management, which claimed that Singleton owed boat storage fees, transit fees, and attorneys' fees, to put the contracts in evidence before the trial judge who is the finder of fact. Although the contract between Washington D.C. Associates and Singleton for the term 1994-1995 was submitted into evidence, no documents were submitted to establish a contract between 1995 and 1996 and from 1996 to 1997. The latter contract, if it existed, would be executory, and in place, at the time MIF Realty took over the marina concession following the bankruptcy of Washington D.C. Associates. It was essential, as a matter of proof, to show that MIF Realty was assigned or became the transferee of the contract pursuant to the Order of the Bankruptcy Judge and possessed the contract claims lodged against Singleton. These factual issues should have been remanded to the trial judge for resolution.

It is the province of the trial court to make factual findings on the evidence, not the Court of Appeals. As the Court has stated, which is equally applicable here: "[t]he District Court's lack of precision, . . ., is no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding." *Amadeo v. Zant*, 486 U.S. 214, 228 (1988).

The decision of the Court of Appeals on this point is contrary to the decisions of the Court and the traditional and well established role of a Court of Appeals as a court of limited jurisdiction to *review* findings of fact and conclusions of law. The Court of Appeals is not a fact finder and, based upon exhaustive research, no other U.S. Court of Appeals has ever taken the position that, in a case before it on review, the Court of Appeals can find facts in contested matters.

III. The decision of the Court of Appeals to uphold the dismissal of Singleton's counterclaims as frivolous on an abuse of discretion standard of review without findings by the District Court as to why the counterclaims were frivolous is contrary to Rule 11 and conflicts with the holding of the Court in *Cooter & Gell* and decisions of other Courts of Appeal such as the Second Circuit.

Pursuant to Rule 11, the District Court ordered *sua sponte* that "defendants' counterclaims are DISMISSED as frivolous and designed to harass and delay." Order, filed January 6, 1999, App. 57a. The Court of Appeals upheld the dismissal of defendants' counterclaims under an abuse of discretion standard of review. Opinion of the Court, App. 18a. In so holding, the Court below misapplied the standard of review of Rule 11 sanctions established by the Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

The Court in *Cooter & Gell* described the standard of review as follows: "[a]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

496 U.S. at 405.

Dismissal of a party's substantive claims is a serious sanction because it deprives a party of his day in court. While the Court has held that a Rule 11 sanction, which *incidentally* affects a litigant's substantive rights, does not violate the Rules Enabling Act, 28 U.S.C. § 2072, *Business Guides v. Chromatic Communications Enter., Inc.*, 498 U.S. 533 (1991), the Court has never viewed Rule 11 as a valid and lawful mechanism for denying a litigant's substantive right to his day in court on nonfrivolous claims. The Court has never endorsed dismissal of a litigant's claims *ipse dixit* merely on a conclusory finding of a district court that such claims were frivolous and baseless and interposed for an improper purpose. The Court also has never held or allowed Rule 11 dismissals of claims to be reviewed by a highly deferential "abuse of discretion" standard, as that standard is customarily applied.

Rule 11 specifically provides: "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Fed. R. Civ. P. 11(c)(3). In this case, there was no explanation by the District Court of the basis upon which it found the claims to be frivolous. Consequently, there was no basis upon which the Court of Appeals could review the district court's determination that the counterclaims are frivolous.

The review conducted by the Court below was not the kind of review mandated by the Court, where the issue at stake is

whether a party's substantive claims for relief are frivolous or not. The review conducted by the Court below also did not comport with the standard of review conducted by other circuits where the Rule 11 sanction related to the dismissal of claims. For example, in *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), the Court of Appeals stated:

> "Our review of the district court's decision to impose sanctions in the present case is in accordance with the deferential standard mandated by *Cooter & Gell.*
>
> There is no doubt that the arguments presented by Mareno were not persuasive. Nevertheless, to constitute a frivolous legal position, for purposes of Rule 11 sanction, it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands. Thus, not all unsuccessful legal arguments are frivolous or warrant sanction. The positions advanced by Mareno and his attorney, however faulty, were not so untenable as a matter of law as to necessitate sanction. Nor did they constitute the type of abuse of the adversary system that Rule 11 was designed to guard against.

Mareno, 910 F.2d at 1047 (citations omitted).

In *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995), *cert. denied sub nom., Bank of Israel v. Lewin*, 516 U.S. 916 (1995), the Second Circuit again stated:

> Under the objective standard, in order to warrant an award of Rule 11 sanctions on the basis that a complaint is not well grounded in fact or law, "it must be" patently clear that a claim has absolutely no chance of success . . . .

Sussman, 56 F.3d at 457 (*quoting Oliveri v. Thomp n*, 803 F.2d 1265, 1274 (2d Cir. 1986)).

> Several other Circuits have distinguished between complaints and other court papers, taking the view that, whatever the analysis applicable to motions and other papers filed after the commencement of the litigation, special care must be taken to avoid penalizing the filing of a nonfrivolous complaint, for otherwise a plaintiff who has a valid claim may lose his right "to vindicate his rights in court," [cites]

Sussman, 56 F.3d at 458.

In *Caisse Nationale De Credit Agricole-CNCA v. Valcorp, Inc.*, 28 F.3d 259 (2d Cir.1994), the Second Circuit added:

> The findings of a sanctioning court must of course be sufficient to permit appellate review.

Caisse Nacional, 28 F.2d at 264-65. *See also Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157 (3d Cir. 1999).

The test of frivolousness followed by the Second Circuit follows precisely the test established by the Court in *Neitzke v. Williams*, 490 U.S. 319 (1989): whether the pleading lacks "an arguable basis either in law or in fact." 490 U.S. at 325. In making a frivolousness determination, the assessment of the pleaders' actual allegations must be weighed in favor of the pleader and cannot serve as a fact finding process for the resolution of disputed facts. *Denton v. Hernandez*, 504 U.S. 25 (1992).

The District Court made no findings as to why defendant's counterclaims were frivolous. The District Court dismissed the counterclaims on the grounds that: "[b]oth counsel have engaged in name-calling, personal attacks and petty arguments and have burdened the court with repetitious arguments already

rejected. Defense counsel has filed counterclaims that *appear* frivolous and designed primarily to harass and delay a final resolution in this case." (Emphasis added) Opinion, January 5, 1999, App. 48a-53a, at 52a-53a.

An examination of the record of the submissions in the Court will reveal that defendant's counsel did not engage in such conduct. The record shows what *plaintiff's counsel said* that defendant's counsel and his associate said. In any event, that matter has nothing to do with the frivolousness of a claim. Defendant's counsel did indeed charge Marina Management with misleading the court in backdating invoices, which defendant's counsel claimed was a fraud upon the Court. However, the District Court agreed with defendant's counsel on that issue and sanctioned the other side.

Singleton's counsel did indeed claim twice ("repetitious arguments") that the "party" which brought the action was not a real party in interest. The first time the District Court sustained Singleton's argument in the case of James Creek Marina. Opinion, App. 25a. When a substituted party (Marina Management as Agent for MIF Realty) was interposed in an Amended Verified Complaint, defendant's counsel again claimed that the substituted party was not a real party in interest, a position the Court of Appeals sustained.

Neither the District Court nor the Court of Appeals articulated why the claims were frivolous. The District Court and the Court of Appeals did not, for example, find that the second and fifth counterclaims were frivolous. These courts ruled only that the claims were deficient "because of their integral relationship to the legitimate pursuit of plaintiff of this lawsuit." Order App. 48a-53a at 52a-53a; Opinion, App. 1a-20a at 19a. This "finding" has nothing to do with "frivolousness," and, in any event, the Federal Rules permit "permissive counterclaims".

When the District Court ordered defendant (and his counsel) to withdraw the "offending pleadings" under the threat of sanctions or reference to the District Court's Grievance Committee, Order, App. 41a-43a at 42a-43a, Singleton's counsel was forced to choose between giving up defendant's substantive claims to save himself from sanctions, or meet his professional responsibility to diligently and zealously protect and advance his client's interests and accept the damage to his professional reputation from a Rule 11 sanction (which had never been imposed upon him in over 30 years of litigation practice). Counsel should never have been put in that position.

Counsel, considering the evidence before him and his judgment that the claims he sought to prosecute were more than arguable, professionally was unable to abandon his client or surrender his client's substantive rights.

To try to assuage the District Court which had ruled that the boat had been lawfully seized and not to be viewed as defying the District Court, Singleton's counsel agreed to withdraw the Fourth Counterclaim believing that the relief sought from an ultimate finding of unlawful seizure would be preserved in the Fifth Counterclaim. However, the Fourth Counterclaim had not been withdrawn when the counterclaims were dismissed.

Counsel for Singleton had consistently claimed that Marina Management had no right to seize the vessel, as it was not the real party in interest, a position sustained by the Court of Appeals. The Amended Verified Complaint plainly stated that Singleton's contract with Washington D.C. Associates [not Marina Management] expired on June 6, 1996, well before the seizure. The District Court had sanctioned the Marina for backdating invoices and misrepresenting to the District Court that transient fees were charged at the time stated in the statement attached to the Verified Complaint. Singleton stated that upon of the release of his vessel from arrest, there was

damage to the vessel. Counsel then sent an associate to look at the vessel to note the damage when the boat was returned. Affidavit of Thomas J. Whalen, App. 100a. Singleton stated he was having trouble finding another berth for his vessel because the Marina's staff were defaming him as a deadbeat and an undesirable character. Affidavit of Thomas J. Whalen, App. 98a.

There was no evidence in the record that Singleton signed any contract but the one in 1994, and defendant intended to put Marina Management to its proof, but never got the chance. Depending upon the proof to be adduced, Singleton may or may not have prevailed. However the critical point is that neither the District Court nor the Court of Appeals found that these counterclaims were frivolousness or baseless. There was no disposition on the merits by summary judgment under Rule 56 or under Rule 12(b)(6). It was simply a conclusory finding without explanation by the District Court that the counterclaims were frivolous, which, on review, the Court of Appeals determined was not an abuse of discretion.

It was indeed ironic that the Court of Appeals failed to give due deference to Judge Friedman's ruling that he was misled by Marina Management's annexed statement of amounts owed, an event Judge Friedman experienced personally. The annexed statement fairly read, as Judge Friedman read it, clearly represented that from September 1995 transient fees had been charged to Singleton. The protestations of good faith and candor by Marine Management notwithstanding, *anyone*, looking at the Statement (*see* Statement, App. 73a) had to conclude that transient fees were charged to Singleton since 1995. See, for example, that on 10/31/91, an invoice D400 was issued with payment "due" on 11/10/95. How could a payment be due when it was not even billed? Judge Friedman concluded the obvious that Singleton was charged and billed for transient fees all along at least since

September, 1995 and did not pay them on or before the due date, and he was wrong *because* he was misled.

Relying on that statement of amounts owed and the verified statement of the Marina, Judge Friedman had arrested Singleton's boat and set the bond at an excessive amount which Singleton could not afford. Notwithstanding the District Court's finding that he was misled, the Court of Appeals erroneously and incredibly found that there was no factual basis for Judge Friedman's decision and the Rule 11 sanction he imposed.

Judge Friedman's ruling on the Rule 11 sanction he imposed upon the Marina should be upheld.

In the same breath, the Court below then summarily upheld Judge Friedman's Rule 11 dismissal of Singleton's counterclaims, applying a wholly deferential standard, on Judge Friedman's conclusory finding that the counterclaims were frivolous and interposed for an improper purpose. Where a Rule 11 dismissal is at issue, Rule 11(c) mandates more than a conclusory statement of frivolousness. It is submitted that Rule 11(c) requires an explanation similar in scope to that described by four Justices of the Court in *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960).

An attorney sanctioned under Rule 11 for filing "frivolous counterclaims" suffers damage to his professional reputation. Justice Stevens wrote, in his concurring and dissenting opinion in *Cooter & Gell*:

> Despite the changes that have taken place at the bar since I left the active practice 20 years ago, I still believe that most lawyers are wise enough to know that their most precious asset is their professional reputation. Filing unmeritorious pleadings inevitably tarnishes that asset.

496 U.S. at 413.

An examination of decisions of Courts of Appeals decisions applying the abuse of discretion standard since *Cooter & Gell* reveal that some of these courts are having difficulty applying this standard of review where the issue of dismissal of claims as frivolous or baseless is at stake. These courts are grappling with the problem of reconciling the highly deferential standard of abuse of discretion, (which they have traditionally applied) with their belief that they should evaluate whether the dismissed claim had an arguable basis in law and fact, rather than simply deferring to the judgment of the district court. This is not a case like many reported decisions where the claimant continues to reassert claims already determined to be without basis or merit. Such conduct is properly sanctioned under Rule 11. This is not such a case.

As Professor Lazaroff wrote: "The critical question is whether the 1993 amendments to Rule 11 will strike an acceptable balance between the need of the federal courts to be free from wasteful, frivolous, or vexatious litigation and the obligation of attorneys to represent their clients vigorously and imaginatively without fear of reprisal." Daniel E. Lazaroff, *Foreword, The Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or Retreat on Attorney Sanctions?*, 28 Loy. L.A. L. Rev. 1, 3 (1994).

Similarly Professor Vairo wrote: "This Author suspects that the Rule 11 battle will go on precisely because, as Judge Schwarzer predicts, we are seeing the Federal Rules of Civil Procedure being used to regulate attorney conduct. As discussed at the outset of this Article, we must question the extent to which this apparently benign trend will go too far and undermine the independence of the legal profession and our adversarial system of civil justice – a system that has advanced the law in so many important ways." Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 Loy. L.A. L. Rev. 39, 87 (1994). *See also* Edward D. Cavanaugh, *Rule 11 of the Federal*

Rules of Civil Procedure: The Case Against Turning Back the Clock, 162 F.R.D. 383, 397 (1995) (criticizing the abuse of discretion standard of appellate review of Rule 11 sanctions); Michael A. Annis, Note, *Civil Procedure: Cooter & Gell v. Hartmarx Corp.: An Analysis of Rule 11 and Its Appropriate Standard of Review*, 44 Okla. L. Rev. 495 (1991).

In this case, the claims alleged were carefully considered by counsel and the District Court dismissed them, *ipse dixit*, without any findings which stated the basis for the District Court's conclusion that the counterclaims were frivolous thereby tarnishing the reputation of the attorney involved. The District Court did not state, or find, as required by Rule 11(c)(3), how and why the counterclaims were frivolous or interposed for an improper purpose, i.e., to harass and delay a final resolution of the case. Without such findings or explanation, it was impossible for the Court below to review the District Court's determinations of frivolousness. The wholly deferential standard of review applied by the Court below was contrary to the abuse of discretion standard articulated by the Court in *Cooter & Gell*, and followed by Circuits like the Second Circuit in respect to the dismissal of claims under Rule 11.

CONCLUSION

The fundamental problem in this case is that both the District Court and Court of Appeals were exasperated that this seemingly simple contract dispute for moneys owed spawned such contentious litigation, expended judicial resources, and could not be resolved by the parties. In the interest of judicial expediency, it is submitted, the courts below took shortcuts to end the litigation and, in so doing, trampled over the due process rights of Singleton and the professional reputation of his counsel.

The case at bar is important, to Singleton certainly and to his counsel against whom a Rule 11 sanction has been lodged as a consequence of his faithful and zealous professional representation of his client's interests and rights.

For the Court, this case is important because it involves due process rights which the Federal Rules of Civil Procedure were designed to ensure. As the Court said just a few months ago in *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579 (2000): "The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees." *Nelson*, 120 S. Ct. at 1584. *Nelson* fundamentally stands for the proposition that the Court will not stand for judicial shortcuts which violate the Federal Rules and consequently the due process rights of litigants.

The case and the legal questions which the petitioner now brings to the Court are about judicial shortcuts which conflict with, and are inimical to, due process that the Federal Rules were designed to protect. The issues petitioner brings to the Court are uncomplicated, sharply drawn and important. They were decided in error by the Courts below and are in conflict with both the decisions of the Court and other U.S. Courts of Appeal.

The issues are also fundamental: Who has the right to bring a claim to the Federal Courts? Are facts to be decided on evidence of the quality mandated by the Federal Rules of Evidence, or are they to be decided on the basis of colloquies between judge and lawyer and the arguments and statements of counsel? When the District Judge has not resolved issues of fact on the evidence before him or her, can and should the Court of Appeals decide them?

What standards or procedure should a Federal Judge follow and what findings should he or she be required to make

under Rule 11 when determining whether a claim is baseless and frivolous and should be dismissed under Rule 11?

Does the abuse of discretion standard set by the Court in *Cooter & Gell* need to be clarified to ensure that the dismissal of claims as frivolous under Rule 11 are reviewed carefully under a proper standard established by the Court? Does such a wholly deferential standard of review of Rule 11 dismissals threaten to undermine a party's due process right to his day in court and threaten to chill his counsel's duty of faithful, enthusiastic and zealous representation?

Diligent and zealous representation by counsel within the due process confines of the Federal Rules is at the core of our adversary system and is as essential to our civil justice system as the judiciary itself. The courts below, it is submitted, have lost sight of this fact.

For the reasons set forth herein, petitioner urges that this petition for a writ of certiorari be granted.

Date: June 26, 2000

Respectfully submitted,

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